No. 82-1477

IN THE

Supreme Court of the United States

OCTOBER TERM, 1982

PACIFIC STANDARD LIFE INSURANCE COMPANY and GRAHAM BEACH PARTNERS,

Appellants,

vs.

COMMITTEE TO SAVE NUKOLII, COUNTY OF KAUAI, and EDUARDO E. MALAPIT, in his capacity as MAYOR OF THE COUNTY OF KAUAI,

Appellees.

On Appeal from the Supreme Court of Hawaii

MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF AND BRIEF OF AMICUS CURIAE NATIONAL ASSOCIATION OF REALTORS® IN SUPPORT OF JURISDICTIONAL STATEMENT OF APPELLANTS

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MOTION FOR LEAVE TO FILE AMICUS CURIAE BRIEF

The NATIONAL ASSOCIATION OF REALTORS® (hereinafter sometimes "National Association") respectfully moves the Court for leave to file its brief *amicus curiae* in support of Appellants' Jurisdictional Statement. The grounds for this motion are as follows:

1. The NATIONAL ASSOCIATION OF REALTORS® is a non-profit professional association comprised of over 600,000 persons engaged in all phases of the real estate business. The NATIONAL ASSOCIATION

OF REALTORS® is the chief spokesman for the real estate industry and for the millions of American property owners its members represent. An estimated 80% of all real estate licensees in the United States are members of the National Association. These professionals are responsible for over 80% of the resale real estate transactions, totalling approximately $25.5 billion in 1982. As these numbers indicate, the National Association represents a major segment of this nation's economy.

2. One of the primary purposes of the National Association is the protection and promotion of private ownership of real property.

3. The ruling of the Hawaii Supreme Court is of vital concern to the National Association because of the direct threat it poses to private property rights and its anticipated widespread impact on future real estate development.

4. The National Association sought consent of Appellants and Appellees and received the consent of the Appellants and of Appellees, County of Kauai and the Mayor of the County of Kauai. These consents are filed herewith.

The NATIONAL ASSOCIATION OF REALTORS® requests that it be permitted to file the annexed brief *amicus curiae*.

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On Appeal from the Supreme Court of Hawaii

BRIEF OF AMICUS CURIAE NATIONAL ASSOCIATION OF REALTORS® IN SUPPORT OF JURISDICTIONAL STATEMENT OF APPELLANTS

IDENTITY OF AMICUS

The NATIONAL ASSOCIATION OF REALTORS® (hereinafter "NAR") is a non-profit professional association comprised of over 600,000 persons engaged in all phases of the real estate business.

NAR was created in 1908 to promote and encourage the highest and best use of the land, to protect and promote private ownership of real property and to advance professional competence in the rendition of real estate services.

NAR is the owner of various registered service and collective membership marks, including the mark "REALTOR®." Over the years NAR has promoted a public understanding of the term "REALTOR®" as identifying a member of NAR engaged in the real estate business and subscribing to and bound by a strict Code of Ethics.

NAR includes among its members real estate brokers, managers, appraisers, counselors and a variety of other participants in the residential, commercial, industrial, farm and investment real estate markets. Through its many programs and the programs of its affiliated Institutes, Societies and Councils, NAR has been involved in and committed to the solution of every significant problem encountered by property owners for three quarters of this century. Through its long and undeviating commitment to the protection of the property owner and his rights and interests in his property, NAR has earned the right to speak not only for the real estate industry but for the American property owner.

Of the problems which have concerned NAR, none has been more fundamental or of greater importance than the preservation of private property rights founded in the United States Constitution. This commitment to private property rights is the cornerstone of NAR, for without such rights there would be no ownership, development, transfer, or enjoyment of real property.

INTEREST OF AMICUS

The impact of the issue presented in this case should not be perceived as limited solely to the application of a rezoning referendum to a developer on the island of Kauai. The consequences of the Hawaii Supreme Court's decision reach far beyond the shores of Kauai, and beyond the boundaries of any one state, involving the measure of protection afforded all property owners by the Fifth and Fourteenth Amendments of the United States Constitution against the "taking" of primary rights and benefits of land ownership without compensation.

The historical and substantial commitment of NAR to the preservation of private property rights mandates its attention to the threat this case represents to property owners and property ownership in this country.

NAR is uniquely positioned to perceive the seriousness of this threat. Not only does its membership span the entire nation, these members are involved in upwards of 80% of resale property transactions. This comprehensive involvement at the grassroots level of land

development, investment and sale provides NAR with a direct and unobstructed view of the impact regulatory actions such as the one at issue will have on the exercise of constitutionally protected property rights.

NAR does not propose herein to duplicate the legal arguments so ably presented in Appellants' Jurisdictional Statement. Rather, NAR endorses and urges to this Court these arguments. Further, to avoid unnecessary repetition, NAR adopts the Statement of Facts set forth at length in Appellants' Jurisdictional Statement. The purpose of NAR in submitting this brief *amicus curiae* is to voice the concern of hundreds of thousands of NAR members and the millions of American property owners they serve with the threat which the decision of the Court below constitutes to the rights of private property guaranteed by the Constitution.

ARGUMENT

I.

THE DECISION BELOW VIOLATES THE "TAKINGS CLAUSE" OF THE FIFTH AMENDMENT, AS INCORPORATED IN THE FOURTEENTH AMENDMENT, BY FRUSTRATING DEVELOPERS' REASONABLE INVESTMENT-BACKED EXPECTATIONS.

A. The "Takings Clause" Requires Just Compensation For Government Regulation That Denies Reasonable Investment-Backed Expectations.

This Court has consistently held that governmental conduct which frustrates or denies reasonable investment-backed expectations constitutes a "taking" which requires the payment of just compensation. In 1922 Justice Holmes authored the seminal statement that, "while property may be regulated to a certain extent, if regulation goes too far it will be recognized as a taking." *Pennsylvania Coal Co. v. Mahon*, 260 U.S. 393, 415 (1922). Since that time, this constitutional principle has been repeatedly reaffirmed by this Court. See, e.g., *Loretto v. Teleprompter Manhattan CATV Corp.*, 102 S. Ct. 3164, 3171 (1982); *PruneYard Shopping Center v. Robins*, 447 U.S. 74, 83 (1980); *Kaiser Aetna v. United States*, 444 U.S. 164, 174-175; *Andrus v. Allard*, 444 U.S. 51, 65-66 (1979); *United States v. Central Eureka Mining Co.*, 357 U.S. 155, 168 (1958). It is true that the determination of what constitutes a "taking" is a "question of degree and cannot be disposed of by general propositions," *Pennsylvania Coal Co. v. Mahon*, *supra*, 260 U.S. at 416, and requires that factual inquiries be made in each instance. *Penn Central Transportation Co. v. City of New York*, 438 U.S. 104, 124 (1978). But this Court has never permitted such determination to be made "willy-nilly" without legal rationale or standards. To the contrary,

this Court has insisted that the constitutional analysis of alleged "takings" involve a consideration of three factors: first, the economic impact of the regulation; second, its interference with reasonable investment-backed expectations; and third, the character of the governmental regulation. *PruneYard Shopping Center v. Robins, supra,* 447 U.S. at 83; *Kaiser Aetna v. United States, supra,* 444 U.S. at 175; *Penn Central Transportation Co. v. City of New York, supra,* 438 U.S. at 124.

Although each of these factors must be evaluated in the balancing of governmental versus private interests required to resolve "taking" issues, the nature and extent of interference with "investment-backed expectations" has been found to be of "particular significance." *Loretto v. Teleprompter Manhattan CATV Corp., supra,* 102 S. Ct. at 3171. The particular significance of this factor is the direct result of this Court's assurance in its *Pennsylvania Coal* decision that the reasonable investment-backed expectations of property owners would not be frustrated or denied by governmental restrictions or prohibitions without the payment of just compensation.

In stark contrast to this Court's historic protection of reasonable investment-backed expectations, the Hawaii Supreme Court would repudiate and ignore such expectations entirely in determining whether a retroactive change in zoning laws to terminate preexisting development rights requires the payment of just compensation.

The issue presented by this case is thus not a mere semantic squabble or formula foofaraw, but fundamental constitutional conflict presenting a substantial federal question.

This Court's decision in *Pennsylvania Coal Co. v. Mahon, supra,* firmly established the proposition that

even a state statute that substantially furthers important public policies may so frustrate reasonable investment-backed expectations as to constitute a "taking" under the Constitution. *Penn Central Transportation Co. v. City of New York, supra*, 438 U.S. at 127. In the present case, the referendum not only frustrates the investment-backed expectations of the Developers, it literally annihilates them.

In *Pennsylvania Coal, supra*, a coal company sold land and a house but expressly reserved the right to remove the coal located thereunder regardless of any risk to the house. The homeowner brought an action seeking to enjoin the mining of coal under his property in such a way as to cause a subsidence of the surface and of his house. A Pennsylvania statute *enacted after the transaction* prohibited the mining of coal that caused the subsidence of any house, unless the house was the property of the owner of the underlying coal and was more than 150 feet from improved property owned by another. This Court refused to give effect to the statute which would have made it commercially impracticable for the company to mine the coal on the ground that its application would have had nearly the same effect as a complete destruction of the coal company's rights, 260 U.S. at 414. This Court held that the statute effected an unconstitutional "taking" and reversed the decision of the Pennsylvania Supreme Court that had enjoined the mining of coal.

Never repudiated, always affirmed by the Court, the rationale and decisional standards established in *Pennsylvania Coal* to identify a "taking" requiring just compensation are squarely applicable in the present case and should be controlling if the Developers' expectations were "investment-backed" and "reasonable."

B. The Developers' Expectations In This Case Were Both Investment-Backed And Reasonable.

On the record, there simply can be no question that the Developers' expectations here were "investment backed." Aside from the purchase of the development site and the substantial managerial, architectural, legal, and other overhead expenditures which went into the planning of the project, the Developers actually completed 150 condominiums and one-third of a resort hotel before the decision of the Hawaii Supreme Court was rendered. These investments also included the development of special public improvements required by County officials, including public beach development, road improvements, and the construction of water purification facilities to be made to the community in general, as well as the development.

The undisputed and indisputable reality of the Developers' investment in support of their expectation leaves the "reasonableness" of such expectation as the decisive issue in determining whether this Court's rule in *Pennsylvania Coal* should control here.

The "reasonableness" of the Developers' expectation that they could proceed safely with their development notwithstanding the certification of the referendum may be evaluated from two standpoints.

From one standpoint, reasonableness may be judged in terms of the actions and events which encouraged or induced the Developers' expectations. The record is replete with such actions and events including, but by no means limited to, first, the unambiguous language of Section 5.11 of the County Charter; second, the written opinion of the County Attorney advising that the certification of the referendum did not suspend the current zoning of the Developers' property and recommending that the Planning Commission of the County of Kauai

continue to process the Developers' permits; and third, two decisions by the Circuit Court of Hawaii, one ruling that the filing of the referendum petition did not suspend the effect or operation of the zoning ordinance, *In the Matter of the Application of Pacific Standard Life Insurance Company*, Civil No. 2260 (Haw. Cir. Ct. Sept. 5, 1980), and the other, refusing to grant a temporary restraining order and preliminary injunction to halt the construction of the condominiums, *Committee to Save Nukolii v. Nishimoto*, Civil No. 2321 (Haw. Cir. Ct. Sept. 5, 1980).

The Developers were reasonably entitled to proceed with their project in reliance upon the clear meaning of Section 5.11 of the Kauai County Charter which provided that "A referendum that nullifies an existing ordinance shall not affect any vested rights or any action taken or expenditure made up to the date of the referendum" for three reasons: first, the language of Section 5.11 was, as the Court below itself acknowledged, entirely unambiguous (Appendix to Appellants' Jurisdictional Statement ("App.") at A-10); second, there existed no case, precedent, dictum or other legislative or judicial indication that Section 5.11 would be interpreted other than literally; and third, as further evidence of the understanding that Section 5.11 was to be read literally, even opponents of Developers' project believed it necessary to amend Section 5.11 to give retroactive effect to the referendum since they included such a Charter amendment on the same ballot as the referendum.

The opinion of the Kauai County attorney was yet another action which evidenced the reasonableness of the Developers' reliance on a literal reading of Section 5.11. That opinion concluded that the certification of the referendum did not suspend the zoning ordinance and advised that the Planning Commission could and should

legally continue to process the Developers' permits (App. at A-66-67).

To the language of the statute, the referendum proponents' action to amend Section 5.11, and the opinion of the County Attorney may be added two Hawaii Circuit Court decisions, each of which read Section 5.11 literally. Thus, in an action brought by the Committee to Save Nukolii, summary judgment was granted in favor of the Developers, with the Court ruling that the Kauai County Charter "contains no provision that suspends the effect or operation of an ordinance when a referendum petition is filed and certified. . . ." *In the Matter of the Application of Pacific Standard Life Insurance Co., supra.*

Just two months after its first ruling, the Hawaii Circuit Court once again provided its assurance to the Developers that they were proceeding in accordance with the law by refusing to grant a Motion for Temporary Restraining Order and Preliminary Injunction sought by the Committee to Save Nukolii to halt construction of the condominiums. *Committee to Save Nukolii v. Nishimoto, supra.*

Viewed in terms of the events and actions on which the Developers could base their decision to proceed with their development and invest in their expectation of accomplishment, there is not one which suggested, hinted or implied that they did so at their risk and peril and without reason.

The other standpoint from which the reasonableness of the Developers' investment-backed expectations can be viewed is simply in terms of what actions the Developers could have taken, but didn't, which would have identified their expectations as "unreasonable." Viewed in these terms, it is clear the Developers did everything

they could. The refusal of the Committee to Save Nukolii to appeal the State Circuit Court's affirmance of the decision of the Planning Commission, *In the Matter of Application of Pacific Standard Life Insurance Co., supra*, and the denial of the Committee's request for a temporary restraining order and preliminary injunction, *Committee to Save Nukolii v. Nishimoto, supra*, frustrated the only opportunities which the Developers had to obtain "early warning" of the Hawaii Supreme Court's interpretation of Section 5.11.

From any perspective, the Developers' expectations that their property rights and investments in them would be protected from retroactive application of the referendum were reasonable. And if they were reasonable and can nevertheless be frustrated, then the constitutional guarantees of private property are protected by nothing more than the whim and caprice of popular plebiscite.

II.

THE HAWAII SUPREME COURT'S DECISION APPLIES STATE PROPERTY LAW TO EXTINGUISH FEDERAL CONSTITUTIONAL RIGHTS.

The decision below reaches its result by treating in isolation two issues which are inextricably intertwined and interdependent. Thus, the first issue, whether the referendum had retroactive impact, was stated by the Court to involve a balancing of the interests of private landowners to develop their resort-zoned property and the interest of the electorate to prevent development by referendum (App. at A-7). The Court ruled in favor of retroactive application of the referendum process and against the Developers' rights (App. at A-22). This result was accomplished by rejecting the literal meaning of the

County Charter provisions which placed specific limitations on the exercise of the referendum power and analyzing the case under a theory of equitable estoppel (App. at A-10). Employing that theory, the Court was able to conclude that the Developers had no right to proceed with their development other than at their own risk (App. at A-16).

The second issue addressed by the Court was whether the application of the zoning referendum to the Developers' project was consistent with constitutional concepts (App. at A-22). The Court summarily disposed of this issue, finding that its prior estoppel analysis resolved the constitutional considerations against the Developers (App. at A-24). By concluding that the Developers were estopped from acquiring rights to construct the resort after the referendum was certified, the Court determined the Developers had nothing "taken" from them (App. at A-25).

This is "bootstrap" reasoning. It presents the Developers here, and every other owner and developer of real estate bound by the precedent established, with an intolerable "Catch 22" which makes the constitutional concept of "taking" wholly illusory. If, as the Court below has held, vested property rights may be "taken" without compensation by merely making the regulation or referendum accomplishing the taking effective on a date before they were vested, then property rights have no more substance than a ministerial act.

Only by rejecting the admittedly unambiguous language of the County Charter was the Hawaii Supreme Court able to establish the date of *certification* of the referendum rather than the date of the referendum itself as the pivotal date from which to judge the Developers' actions. And only after it had moved the operative date back from November 4, 1980, the date of the

referendum, to January 30, 1980, the date of certification, did it begin its analysis of the constitutional impact of the referendum's application to the Developers. Thus, the entire analysis of whether the referendum was reasonably related to the county needs (App. at A-23) and whether it constituted an uncompensated taking (App. at A-24-25) was performed under a factual premise *created* by the Court, which premise did not exist at the time the Developers' good faith expenditures were made.

By stripping the Developers of all protection afforded to them by Section 5.11 of the County Charter, the Hawaii Supreme Court was able to conclude that the Developers "had only a reasonable belief that the Nukolii site could be developed in accordance with the resort zoning" and that the Developers' "expenditures and site preparation work constituted business risks rather than a basis for constitutional claims" (App. at A-24).

This is not logic; this is not law; this is not due process as the Constitution defines it. It is, at most, the product of judicial illusionists who make substantial, vested property rights vanish into thin air, leaving nothing but an "empty fee."

CONCLUSION

No concept is more deeply rooted in American jurisprudence than the right to own and use property free from deprivation by unreasonable governmental regulation. The property owner's only shield against unreasonable and confiscatory government regulation is the constitutional guarantees of the Fifth and Fourteenth Amendments against "taking."

Should this Court fail to note probable jurisdiction of the appeal and the issues presented herein, the Fifth Amendment's protection against the "taking" of private property, made applicable to the states through the Fourteenth Amendment, *Webb's Fabulous Pharmacies, Inc. v. Beckwith*, 449 U.S. 155, 160 (1980); *Chicago, B. & O. R.R. v. City of Chicago*, 166 U.S. 226, 239 (1897), will prove merely an illusion for these Developers who have invested significant sums in reliance upon existing zoning and unambiguous language of the County Charter.

But onerous and unjust as is the impact of the decision below on the Developers, the primary concern of the NAR is with its impact on the progress and costs of future land development.

The "taking" of the Nukolii site will serve as a warning to all would-be owners, developers and builders that their property rights are no longer secure under the constitutional guarantees of the Fifth and Fourteenth Amendments. The exercise of heretofore constitutionally-protected private property rights will be "chilled," impacting negatively on all forms of development, including housing, apartments, shopping centers, factories, and recreational and cultural facilities.

Unless the federal questions raised in this appeal are recognized as substantial and resolved by this Court, a property owner will never know whether he owns a property interest that is capable of development.

Developers, too, are now on notice that they may no longer plan their conduct with any reasonable certainty of the legal consequences. Any land development must proceed "at risk" notwithstanding the existence of unambiguous land use ordinances, or letters of opinion authored by municipal attorneys or judgments entered by the courts, or all three.

Although land development has always entailed an element of risk, such as risks posed by current market conditions, economic trends and growth patterns, never before have developers had to face the uncontrollable risk that the plain language of zoning regulations—the very foundations of a rational land development process —could be reinterpreted retroactively to confiscate without compensation a project that had been undertaken in compliance with and in reliance upon that plain language.

Those few developers daring enough to gamble on the zoning laws subject to such reinterpretation will find even fewer sources of financing willing to take such a risk. Investors will not readily put money into a project that could be entirely destroyed by a change in the zoning laws retroactively applied. And those investors who will accept such a risk will translate that risk into added cost to the developer and, hence, the ultimate consumer.

For the foregoing reasons, NAR urges the Court to recognize the substantial nature of the federal questions presented and to note probable jurisdiction, or, in the alternative, grant certiorari.

Respectfully submitted,

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